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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-565

CENTRAL HUDSON GAS & ELECTRIC CORPORATION,
Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

MOTION TO DISMISS APPEAL OR AFFIRM JUDGMENT BELOW

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INDEX.

	Page
Statement	2
1. Introduction	2
2. The Factual Background	3
3. The Decision Appealed From	7
Argument	8
I. The Commission's prohibition of promotional advertising is consistent with First Amendment requirements as delineated by this Court	8
II. The Court below correctly determined that in New York State, paramount state interests justified the Commission's promotional advertising ban	11
III. The Commission's order and the Public Service Law are clear and precise	19
IV. The Commission's order does not deprive Central Hudson of equal protection	22
Conclusion	23

TABLE OF AUTHORITIES.

Cases:

American Column & Lumber Co. v. United States, 257 U.S. 377 (1921)	11
Arnett v. Kennedy, 416 US 134 (1974)	20
Bates v. State Bar of Arizona, 433 U.S. 350 (1977)	9,11
Bigelow v. Virginia, 421 U.S. 809 (1975)	8,9

II.

Page

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 21
Cardinale v. Louisiana, 394 U.S. 437 (1959) 19
Carey v. Population Services International, 431 U.S. 678 (1977) 8
Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) 10
Connally v. General Construction Co., 269 U.S. 385 (1926) 21
Consolidated Edison Company of New York, Inc. v. Public Service Commission of the State of New York, 47 N.Y.2d 94 (1979) 3
Crowell v. Randell, 10 Pet. 368 (1836) 19
First National Bank of Boston v. Bellotti, 435 U.S. 763 (1978) 9
Friedman v. Rogers, ... U.S. ...., 47 U.S.L.W. 4151 (February 20, 1979) 9
Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949) 10
Herndon v. Georgia, 295 U.S. 441 (1935) 19
Keyishian v. Board of Regents, 385 U.S. 589 (1967) ... 21
Linmark Associates, Inc. v. Town of Willingboro, 431 U.S. 85 (1977) 8
Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970) ... 10
New York State Council of Retail Merchants v. Public Service Commission, 45 N.Y.2d 661 (1978) 17
NLRB. v. Gissel Packing Co., 395 U.S. 575 (1969) 11
Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978) 7,9,10
Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) 11
Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376 (1973) 9
Police Department of Chicago v. Mosley, 408 U.S. 92 (1972) 23
Safeway Stores, Inc. v. Oklahoma Retail Grocers, 360 U.S. 334 (1969) 19
SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2nd Cir. 1968), cert. denied, 394 U.S. 976 (1969) 10

Page

Smith v. Goguen, 415 U.S. 566 (1974) 21
Valentine v. Chrestensen, 316 U.S. 52 (1942) 9
Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).....5,6,8,9,11

Statutes:

National Energy Conservation Policy Act of 1978:
Section 102 15
Title II 15
New York Civil Practice Law and Rules, Article 78 .. 2
New York Public Service Law:
Article VII-A 16
Section 4 7
Section 5 7
Section 5(2) 15,20
Section 65 7,12,20
Section 66 7,12
Section 66(2) 20
5 U.S.C. § 7501(a) 20
28 U.S.C. 1257(c)..... 19

Rules:

Rule 16 of the Revised Rules of the Supreme Court of the United States 1

Miscellaneous Authorities:

McKinney's Consolidated Laws of New York, Book 47, Pocket Part, P. 101 16
Report of Member Electric Systems of the New York Power Pool 1978 14

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Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves: (1) that this appeal be dismissed, on the ground that it does not present a substantial federal question; or (2) that the judgment of the New York State Court of Appeals sought to be appealed from be affirmed.

Statement

1. Introduction.

This case involves an appeal from a judgment (App. 74a-75a)[1] of the Court of Appeals of the State of New York. The Court upheld an order of Appellee Public Service Commission of the State of New York (Commission) banning promotional advertising by New York State electric utilities subject to the Commission's jurisdiction.

The Commission's order accompanied its Statement of Policy on Advertising and Promotional Practices of Public Utilities dated February 25, 1977 (App. 32a-55a). It continued a prohibition on promotional advertising imposed in the wake of the 1973 Arab oil embargo. The order was challenged by Central Hudson Gas & Electric Corporation (Central Hudson) in a proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules. The Commission's directive was affirmed by the New York Supreme Court (App. 22a-24a), the Appellate Division of State Supreme Court, Third Department (App. 15a-21a), and finally, the New York Court of Appeals (App. 25a-31a).[2]

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[1] References to App. .... are to pages in Appellant's Appendix to Jurisdictional Statement.

[2] A parallel proceeding challenging the Commission's order was brought by Long Island Lighting Company in the United States District Court for the Eastern District of New York. Judge Pratt granted Long Island Lighting Company a judgment declaring that the Commission's advertising policy statement and subsequent implementing orders: ". . . to the extent that they prohibit plaintiff LONG ISLAND LIGHTING COMPANY (LILCO) from truthful promotional advertising of electric space heating, violates the First Amendment and are, therefore, unconstitutional . . ." He enjoined the Commission from enforcing its prohibition but stayed his order pending consideration of the case by the United States Court of Appeals for the Second Circuit. Portions of Judge Pratt's opinion dealing with promotional advertising are included at App. 88a-97a. Motions to consolidate the Long Island Lighting Company case with the instant case, and *Consolidated Edison Company of New York, Inc. v. Public Service Commission of the State of New York* (79-134) have been filed on behalf of Long Island Lighting Company (79-629) and Scientists' Institute for Public Information, *et al.* (79-595).

The Central Hudson case was determined in the State courts concurrently with another proceeding, *Consolidated Edison Company of New York, Inc. v. Public Service Commission of the State of New York.* That case involved a challenge to another portion of the Commission's Advertising Policy Statement—a prohibition on the use of bill inserts by utilities to espouse the position of utility management on controversial matters of public policy. This Court has noted probable jurisdiction (No. 79-134, October 1, 1979) of an appeal by Consolidated Edison from a decision of the New York Court of Appeals, upholding the Commission's order 47 N.Y.2d 94 (1979). The Consolidated Edison case and this case which is concerned solely with promotional advertising involve substantially different issues. In our view, the noting of probable jurisdiction in *Consolidated Edison* provides no basis for accepting the appeal here.

2. The Factual Background.

The Commission's February 25, 1977 policy statement was issued at the culmination of its investigation into advertising practices by New York State utilities. During the investigation, the Commission considered, *inter alia,* whether it should alter its 1973 ban on promotional advertising by electric utilities (App. 25a-31a). No party advocated permitting general promotion of electricity and the Commission did not find persuasive the contention that its ban should, however, be relaxed to allow advertisement of off-peak loads (including electric space heating). The Commission stated (App. 36a-37a):

> We recognize now, as the Commission did in 1972, that development of off-peak loads may be beneficial in numerous ways. Increased off-peak generation, however, while conferring some beneficial side effects, also con-

> sumes valuable energy resources and, if it is the result of increased sales, necessarily creates incremental air pollution and thermal discharges to waterways. More important, any increase in off-peak generation from most of the major companies producing electricity in this State would not, at this time, be produced from coal or nuclear resources, but would require the use of oil-fired generating facilities. The increased requirement for fuel oil to serve the incremental off-peak load created by promotional advertising would aggravate the nation's already unacceptably high level of dependence on foreign sources of supply and would, in addition, frustrate rather than encourage conservation efforts. We realize, too, that a continued ban on promotion of off-peak electric usage may aptly be described as piecemeal conservationism since promotion of oil for use in heating or internal combustion applications is not similarly proscribed. Nevertheless, conservation of energy resources remains our highest priority. We do not consider it inconsistent with that principle to implement programs that admittedly will be less than optimally effective, in a national context. It is reasonable to believe that a continued proscription of promotion of electric sales will result in some dampening of unnecessary growth so that society's total energy requirements will be somewhat lower than they would have been had electric utilities been allowed to promote sales.

The Commission did state that it would allow advertising if the "preponderant" purpose was to shift load from peak to off-peak (App. 37a). In addition, the Commission stated that it would be prepared to reconsider its ban from time to time if conditions change sufficiently to warrant it (App. 38a).

Several parties petitioned for reconsideration of the Commission's order. When denying the petitions, the Commission specifically considered the free speech First Amendment con-

sequences of its order in response to a contention by Central Hudson that its right of free speech was abridged (App. 57a-58a):

> Central Hudson excepts to our decision to continue the existing prohibition of promotional advertising by both electric and gas companies. The utility contends that under *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), commercial speech is protected by the guarantees of the Bill of Rights and, therefore, our restriction on promotional advertising is void.
>
> * * *
>
> In *Virginia State Board of Pharmacy*, the Court could find no legitimate State interest in restricting the dissemination of pricing information to the public. A much different situation exists here. The rates of electric utilities in this State continue to rise. The need for such increases derives in substantial part from pressures for increasing plant capacity to meeting growing demand. While some progress is being made to price electricity to meet its marginal cost, it is clear that the rates charged today do not cover the marginal costs of new capacity. In these circumstances, promotion of electric usage by electric utilities will simply exacerbate the pressure for spiraling prices. Moreover, when national policy requires energy conservation, the promotion of electricity by regulated public utilities provides totally misleading signals that conservation is unnecessary. This is especially true since the utilities in this State are expected to promote conservation by their customers.
>
> While promotion of off-peak usage, particularly electric space heating, is touted by some as desirable because it might increase off-peak usage and thereby improve a summer-peaking company's load factor, we are convinced that off-peak promotion, especially in the context of imperfectly structured electric rates, is inconsistent

with the public interest,[1] even if it could be divorced in the public mind from promoting electric usage generally. As we pointed out in our Policy Statement, increases in generation, even off-peak generation, at this time, requires the burning of scarce oil resources.[2] This increased requirement for fuel oil aggravates the nation's already high level of dependence on foreign sources of supply.

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[1] Advertisements encouraging installation of heating equipment will frequently occur during the summer periods when air-conditioning usage is at its peak and when requests for conservation are being made.

[2] We distinguish here between promotional advertising designed to shift existing consumption from peak to off-peak hours and advertising designed to promote additional consumption during off-peak hours. It is the latter that we proscribe here.

An additional area of legitimate State interest was pointed out by Chairman Kahn in his separate statement. The uncontrolled promotion of electric heating most likely means the installation of heat pumps, since they are the most promising mechanism for offsetting the relative inefficiency of converting fossil fuels into electricity; but installation of a heat pump means also installation of central air-conditioning. To this extent, promotion of off-peak electric space heating involves promotion of on-peak summer air-conditioning as well as on-peak usage of electricity for water heating. And the price of electricity to most consumers in the State does not now fully reflect the much higher marginal costs of on-peak consumption in summer peaking markets. In these circumstances, there would be a subsidization of consumption on-peak, and consequently, higher rates for all consumers. The promotion of electric consumption at rates that do not reflect the costs of it to society is not the kind of commercial speech contemplated by *Virginia Board of Pharmacy*.

Finally, the Commission concluded (App. 59a):

> It is clear, therefore, that there are ample grounds here for regulation of commercial speech. Manufacturers and dealers, whom we do not regulate, remain free to promote the use of electric equipment and appliances. Such advertising will not provide the same misleading signals to the public and at the same time will provide a means for the public to be advised of the available alternatives.

3. The Decision Appealed From.

In considering Central Hudson's attack on the Commission's ban, the New York Court of Appeals rejected Central Hudson's contention that the Commission lacks statutory authority to impose its ban and that the ban violated Central Hudson's constitutional right to Freedom of Speech and Equal Protection (App. 2a-14a). The court found clear authority for the Commission under the New York State Public Service Law Sections 4, 5, 65 and 66. It noted the imperative need for a utility subject to the Commission's jurisdiction to act in a reasonable manner that will conserve resources of the state and nation (App. 4a-5a). The Court further found that the ban did not abridge Central Hudson's constitutional rights, citing the lower level of protection for commercial speech enunciated by this Court in *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978) (App. 10a). It found that utilities supply energy in a monopoly context making information customers might receive from promotional advertising by utilities of little value since service standards and rates are set by the Commission (App. 12a-13a). The Court concluded (App. 13a-14a):

> Indeed, promotional advertising is not at all concerned with furnishing information as to the "availability, nature, and price" of electrical service. It seeks, instead,

> to encourage the increased consumption of electricity, whether during peak hours or off-peak hours. Thus, not only does such communication lack any beneficial and informative content, but may be affirmatively detrimental to the society. It would not strain the bounds of judicial notice for use to take cognizance of the present energy crisis. Conserving diminishing resources is a matter of state concern and increased use of electricity is inimicable to our interests. Promotional advertising, if permitted, would only serve to exacerbate the crisis. In short, this constitutes a compelling justification for the ban.

Central Hudson thereupon brought this appeal (App. 76a-77a).

ARGUMENT

I. The Commission's prohibition of promotional advertising is consistent with First Amendment requirements as delineated by this Court.

This case involves commercial speech (Central Hudson desires to advertise to sell more electricity). The Commission's ban must therefore be seen in light of the applicable constitutional standard enunciated by this Court when it recently extended First Amendment protection to commercial speech. The Court has considered commercial speech in a number of contexts, including: *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (pharmacists); *Bigelow v. Virginia*, 421 U.S. 806 (1975) (abortion services); *Linmark Associates, Inc. v. Town of Willingboro*, 431 U.S. 85 (1977) (residential real estate transactions); *Carey v. Population Services International*, 431 U.S.

678 (1977) (contraceptives); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (legal services); *Friedman v. Rogers*, ... U.S. ...., 47 U.S.L.W. 4151 (February 20, 1979) (use of trade names) and *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978) (solicitation of legal services). In addition, the Court has also considered First Amendment rights of corporations in the political arena in *First National Bank of Boston v. Bellotti*, 435 U.S. 763 (1978). In the cases, where it has struck down prohibitions on advertising, and in *Bellotti*, the determination has been accompanied by a finding that the bans were not ~~wanted~~ warranted by the state interests purported to be achieved. This Court has been careful, however, when extending First Amendment protection to commercial free speech to recognize that where important governmental interests are served by advertising bans that the prohibitions would be permitted. The Court has carefully noted that the interests purported to be served when free speech rights are abridged in the commercial context must be weighed against the rights of the speaker and the public to give and receive information. From *Virginia State Board of Pharmacy to Bates* to *Ohralik*, it has noted differences between commercial speech and other kinds. This Court's most complete enunciation of its position on the special nature of commercial speech came in *Ohralik* where it stated (436 U.S. at 455-456 (1978)):

> Expression concerning purely commercial transactions has come within the ambit of the Amendment's protection only recently.[12] In rejecting the notion that such speech "is wholly outside the protection of the First Amendment," *Virginia Pharmacy, supra*, at 761, we were

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[12] See *Valentine v. Chrestensen*, 316 U.S. 52 (1942); *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376 (1973); *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748 (1976).

> careful not to hold "that it is wholly undifferentiable from other forms" of speech. 425 U.S., at 771 n. 24. We have not discarded the "commonsense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. *Ibid.* To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.

The Court further explained the relationship between the First Amendment and government regulation[3] (436 U.S. at 456):

> Moreover, "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). Numerous examples could be cited of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (CA2 1968), cert. denied, 394 U.S. 976 (1969), corporate proxy statements, *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), the exchange of price and production information

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[3] The Court in *Ohralik*, thus reaffirmed the "two tier" theory of speech first formulated in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

among competitors, *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921), and employers' threats of retaliation for the labor activities of employees, *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 61-62 (1973). Each of these examples illustrates that the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity. Neither *Virginia Pharmacy* nor *Bates* purported to cast doubt on the permissibility of these kinds of commercial regulation.

The New York Court of Appeals was fully justified in following this Court's decisions when it upheld the Commission's ban on promotional advertising by electric utilities. The ban is absolutely necessary to carry out a valid state regulatory scheme that assures conservation of foreign fuel oil, the lowest possible rates to electric utility customers and general conservation of electric usage. Accordingly, this appeal raises no substantial constitutional question requiring resolution by this Court.

II. The Court below correctly determined that in New York State, paramount state interests justified the Commission's promotional advertising ban.

A.

Central Hudson argues (Jurisdictional Statement, pp. 10-14) that its promotional advertising, although done by a regulated monopoly, is constitutionally protected because it must compete for some sales with other entitites. It thereby attempts to bring its case under the penumbra of *Virginia Pharmacy* and succeeding cases that were decided in the context of a competitive marketplace. Its argument ignores the basis for the Commission's advertising ban and is without merit.

The utility's operations, including prices and service standards, are subject to complete and absolute control of the Commission (New York Public Service Law § § 65, 66). The company may offer no customer any price or service that is not subject to filed tariff provisions. No sales, discounts or bonuses are permissible under New York Law. On the other hand, a customer living in Central Hudson's service territory may purchase electricity only from Central Hudson. All residents of the service territory, therefore, must bear the cost and other consequences of Central Hudson's promotional advertising. The Commission found that promotional advertising would have an adverse impact on the utility's customers because it will increase rates, use more costly foreign fuel oil and cause environmental degradation because of increased generation. (These important State interests which form the basis for the Commission's ban are discussed, *infra.*)

All that Central Hudson is able to show this Court is that if it can advertise, customers in its service area will have more information about which form of space heating to use—oil, gas or electric. Since Central Hudson sells the latter two, the company's argument concerning advertising is reduced to whether it should be allowed to promote electric heat so that it may compete with oil heat dealers in the marketing arena.[4]

Central Hudson is clearly wrong, as a general matter, when it argues (Jurisdictional Statement, p. 13) that there is intense competition between oil and electricity and gas in the market

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[4] Central Hudson's argument assumes that heating oil dealers are actively advertising for new customers, an assumption not supported by oil dealer difficulties in obtaining fuel supplies to service existing accounts.

for space and water heating. Except for those homeowners who desire to replace existing heating systems and new homes, the vast bulk of Central Hudson's customers have homes with one mode of heat installed when the home is built. Heating systems are not like new cars where a customer will buy a new one every few years.[5]

Even accepting Central Hudson's argument that allowing promotion will increase available information about space heating, there is but a small benefit from promotional advertising—the possibility of providing information to a select few who may be making decisions about the type of heat or water heating to install. This meager benefit must be weighed against the important, countervailing State interests sought to be furthered by the Commission's promotional advertising ban designed to be of benefit to all of the utility's customers.

B.

Central Hudson (Jurisdictional Statement, pp. 14-16) barely addresses the State interests underlying the Commission's ban. Since this Court has stressed the importance of State interests in its commercial free speech decisions, we must deal with the matter in somewhat more detail.

The New York Court of Appeals, in upholding the Commission's order, relied mainly upon the undisputed need to

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[5] The choice of heating system in new homes is usually made by the builders before the home is offered to the public. Home builders (and anyone else) are free to talk to Central Hudson or receive promotional information from heating and appliance dealers about costs and benefits of electric heat.

conserve fuel oil (App. 13a-14a). Central Hudson's criticism of this finding is not that the goal is unimportant but that the Commission's ban on promotional advertising will not do much good. It argues that New York is the only state imposing an advertising ban and that advertising has not been banned by the federal government. We fail to understand why this means that a ban on promotional advertising in New York is constitutionally infirm or otherwise misguided.

The Commission found (App. 37a) that increased generation as a result of promotional advertising ". . . would aggravate the nation's already unacceptably high level of dependence on foreign sources of [oil] supply and would, in addition, frustrate rather than encourage conservation efforts. . . ." This finding is both reasonable and unassailable from a practical standpoint. New York's utilities are required to encourage conservation by their customers. In Central Hudson's case, 775 megawatts of its 820 megawatt capacity are oil fired.[6] Because oil-fired generation is the most expensive and therefore the last to be put on line, each addititional kilowatt hour consumed in New York means that more fuel oil (mostly imported from foreign countries) will be burned.[7]

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[6] Report of Member Electric Systems of the New York Power Pool 1978, (Vol. 1, p. 343).

[7] Central Hudson argues (Jurisdictional Statement, p. 15) that the Commission made but a "faintly affirmative" claim that its advertising ban would promote conservation. If the company had read further it might not have found the claim so "faint". The Commission stated (App. 37a) ". . . conservation of energy resources remains our highest priority. We do not consider it inconsistent with that principle to implement programs that admittedly will be less than optimally effective, in a national context. It is reasonable to believe that a continued proscription of promotion of electric sales will result in some dampening of unnecessary growth so that society's total energy requirements will be somewhat lower than they would have been had electric utilities been allowed to promote sales."

In order to reduce electric usage, New York's utilities are required, in accordance with the New York Public Service Law, to encourage conservation by their customers (§ 5(2)). Central Hudson, which does not dispute the desirability of conservation (Jurisdictional Statement, p. 15) would nevertheless undercut conservation efforts by promotion of electricity (App. 58a).

Title II of the National Energy Conservation Policy Act of 1978 directs the implementation of utility programs to foster and encourage residential energy conservation. The Commission noted (App. 58a) that advertisements encouraging installation of heating equipment will frequently occur during summer periods at times of peak load when requests for conservation are being made. Promotional advertising at these times by electric utilities would have the effect of telling consumers, whom they are supposed to be encouraging to use less electricity, that they should install equipment which will use more electricity. The problem with misleading messages can be avoided, as the Commission noted (App. 58a), by advertisements on behalf of manufacturers and dealers of electric appliances who remain free to promote the use of these devices. Such advertising will provide a means for the public to be advised of possible alternatives. In addition, of course, utilities remain free to provide advice to customers if they request it. The Commission's restriction relates only to direct promotional advertising by the utility itself.

The Commission's determination is in accord with both national and State law which recognize the paramount need to foster conservation and lessen dependence on foreign fuel oil. Recently passed national energy legislation, the National Energy Conservation Policy Act, Section 102 states:

> The Congress finds that (1) the United States faces an energy shortage arising from increasing demand for

> energy, particularly for oil and natural gas, and insufficient domestic supplies of oil and natural gas to satisfy that demand; . . .

The New York State Legislature has made a similar finding when enacting Article VII-A of the Public Service Law establishing utility home insulation and conservation projects (McKinney's Consolidated Laws of New York, Book 47, Pocket Part, p. 101):

> . . . In the state of New York, which consumes, to an overwhelming degree, far more energy than it produces, the need for energy conservation is of particular importance.

In addition to its conservation finding, the Commission made additional determinations which also justify its ban on the promotion of electricity.[8] The Commission found (App. 57a) that promotional advertising of electric service at the present time will have a detrimental impact on utility rates and service. The Commission determined that promotion of electricity would increase the cost of providing electric service, and increase adverse environmental impact as a result of additional generation. One of the Commission's primary concerns, explained in detail on rehearing is related to the impact on electric rates for all customers of utilities if utilities are allowed to advertise. As the Commission stated (App. 57a):

> . . . The rates of electric utilities in this State continue to rise. The need for such increases derives in substantial part from pressures for increasing plant capacity to meet-

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[8] Central Hudson addresses the additional concerns in a footnote (Jurisdictional Statement, p. 14) showing its utter disregard for the New York regulatory process which seeks to assure reasonable electric rates and responsible operation of electric facilities.

> ing growing demand. While some progress is being made to price electricity to meet its marginal cost, it is clear that the rates charged today do not cover the marginal costs of new capacity. In these circumstances, promotion of electric usage by electric utilities will simply exacerbate the pressure for spiraling prices . . . .

The rate problem discussed by the Commission is that utilities in New York State experience different costs of producing electricity at different times of day and year. The Commission has experienced many difficulties in attempting the first steps of establishing rates that reflect varying costs and charging those rates to the customers responsible for their creation. *See, New York State Council of Retail Merchants v. Public Service Commission*, 45 N.Y.2d 661 (1978). At the present time, New York utilities do not, except in isolated instances, have rates that adequately reflect marginal cost differences and do not have economically practical time-of-day metering equipment that can measure fluctuations in usage for most customers.

Utilities are, therefore, unable to charge their customers actual costs but must charge an average cost basis. This means that electricity cannot be priced in an economically efficient manner that maximizes the use of society's resources. It also means that peak loads are underpriced and therefore encouraged. Underpricing of peak loads leads in turn, to the need for new, costly generating facilities. In other words, existing utility rate structures send incorrect price signals to consumers. If some consumers cause increased peak load, all customers will be required to bear a portion of the increased cost burden. The Commission is in the initial steps of attempting to structure electric rates so that customers pay the full

cost of service depending upon the time at which electricity is consumed. The Commission has announced (App. 38a) its intention to review its ban on promotional advertising at such time as the problems presented by an inadequate utility rate design no longer exist.[9]

The Commission also found (App. 62a) that general stimulation of demand through promotional advertising will require the use of more foreign oil by utilities in New York State. In addition, increased electric generation will also be accompanied by increased environmental impacts resulting from atmospheric and thermal discharges which accompany the increased usage of electric facilities.

The Commission's ban, thus, deals with important State interests including conservation and rate stability. Promotion of electricity will, as the Commission found, frustrate conservation efforts and force electric rates upward. These important State interests fully justify the Commission's ban on promotional advertising. There is simply no other way to accomplish these objectives.

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[9] The Commission has been engaged for the last several years in developing more sophisticated rate structures. In its Case 26806—*Proceeding on Motion of the Commission as to Rate Design for Electric Corporations*, the Commission has compiled a record upon which to take initial steps to institute time-of-day pricing; however, sufficient data has not yet been accumulated nor have metering practices been developed to institute rate structures which reflect, except in limited situations, the variations in cost of providing electric service. Central Hudson's argument (Jurisdictional Statement, P. 14, footnote) that the Commission can use its rate power to solve the problem created by promotion simply ignores the reality of the state of the art in rate design. If a utility does not provide proper economically efficient rates, or supply the data that permits such rates to be fixed, it has no basis for complaining that the regulatory commission has not fixed proper rates.

III. The Commission's order and the Public Service Law are clear and precise.

Central Hudson argues (Jurisdictional Statement, pp. 16-21) that the Public Service Law as applied in this case by the New York Court of Appeals is unconstitutional because the Legislature has not provided adequate standards for Commission action to restrict speech by public utilities. The company further argues that the Commission's order is vague and overbroad. Neither contention is correct nor raised in a timely manner. The claims were not raised below[10] and may not be raised for the first time in this Court. This Court has repeatedly held that it will not exercise jurisdiction to consider federal questions presented for the first time in a jurisdictional statement pursuant to 28 U.S.C. 1257(c). *Cardinale v. Louisiana*, 394 U.S. 437 (1959); *Safeway Stores, Inc. v. Oklahoma Retail Grocers*, 360 U.S. 334 at 342 n. 7 (1969); *Herndon v. Georgia*, 295 U.S. 441 (1935); and *Crowell v. Randell*, 10 Pet. 368 (1836). In any event, the claims are without merit.

The New York Court of Appeals did determine that the Commission had statutory authority to restrict promotional advertising (App. 3a-5a). It did so after reviewing the "vast power" conferred upon the Commission by the Legislature. Central Hudson correctly notes that the Court of Appeals' determination in this regard is not a matter reviewable in this Court.

Nevertheless, it seeks to attack the Court of Appeals' decision by arguing that there are no standards in the law sufficient to allow the Commission to restrict the utility's speech. The law, however, contains specific directives (1) that the Commission encourage utilities to act so that they will

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[10] See Central Hudson's petition to the New York Supreme Court (App. 68a-73a).

preserve environmental values and conserve natural resources (Public Service Law § 5(2)), and (2) that the Commission require acts and practices as "will best promote the public interest" (Public Service Law § 66(2)). Further, all utilities are required to provide "safe and adequate service" at "just and reasonable rates" (Public Service Law § 65).

The Commission's order clearly fulfills these objectives and the Court of Appeals so found. The legislative standards followed by the Commission are more than adequate to pass constitutional muster, not only for economic regulation, but also for orders restricting promotional advertising in the context of regulating utility conduct. While the Public Service Law is not a statute designed to regulate speech, it is a statute designed to assure that utilities follow practices that are in the public interest.

This Court has held that speech may be controlled in the context of a general regulatory scheme. *Arnett v. Kennedy*, 416 U.S. 134 (1974). There an employee was dismissed from the Office of Economic Opportunity for violating 5 U.S.C. § 7501(a) authorizing removal for "such cause as will promote the efficiency of the service". Even though the statute did not mention speech, the employee's statements were the cause for his dismissal. This Court rejected appellee's argument that the standard abridged his freedom of expression. Similarly, in this case there was no need for the Legislature to specifically detail the measures that the Commission may use to accomplish valid regulatory goals.[11]

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[11] Central Hudson also argues (Jurisdictional Statement, p. 19) that the Court of Appeals did nothing to narrow the circumstances under which it might find an order restricting speech to be invalid. As we have discussed in Point II, *supra*, there are several important state interests which justify the Commission's order. There was no need for the Court of Appeals to reject any of the grounds set forth by the Commission since they are all valid reasons for an advertising ban.

Central Hudson next attacks the Commission's order on grounds of vagueness and overbreadth; however, the order is neither vague nor overbroad. It provides (App. 31a): "[a]ll electric corporations are hereby prohibited from promoting the use of electricity through the use of advertising, subsidy payments not committed prior to the date of this order, or employee incentives." The order is not one that "men of common intelligence must necessarily guess at its meaning." *Broadrick v. Oklahoma*, 413 U.S. 601, 607 (1973), quoting *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). In *Broadrick* this Court rejected a vagueness challenge to a statute that provided adequate warning of proscribed activities.

Central Hudson knows precisely what it must do—it must not engage in promoting the use of electricity. If it has any doubt as to the meaning of the term, it need only consult the dictionary. Further, the order does not allow the Commission to "pursue [its] personal predilections" as was the case in *Smith v. Goguen*, 415 U.S. 566 (1974) (cited by Central Hudson (Jurisdictional Statement, p. 19)), nor does it create a regulatory maze as was the case in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (cited by Central Hudson (Jurisdictional Statement, p. 19)). The wording and intent of the Commission's order are plain.

Central Hudson's argument that the Commission's order is overbroad is apparently not related to traditional concepts of overbreadth frequently discussed by this Court, *e.g.*, *Broadrick, supra.* Rather, it argues that the Commission prohibits promotion of all electric usage, not just space heating. The Commission's order does apply to all promotion because it is promotion generally that flies in the face of the state interests sought to be achieved by the order. The order is not overbroad but rather carefully designed to assure that electric usage not be stimulated by utility advertising.

IV. The Commission's order does not deprive Central Hudson of equal protection.

Central Hudson's final argument (Jurisdictional Statement, pp. 21-24) is that because electric promotion is prohibited and oil dealers remain free to advertise, it has been deprived of equal protection. The argument lacks merit because the Commission, whose jurisdiction extends only to electric utilities, has acted in accordance with its statutory authority to protect utility customers from the adverse effects of promotion of electric usage. The Court of Appeals found the Commission's order to be properly related to valid governmental interests.

Oil dealers have not been singled out for special treatment. There has been no attempt on the part of the State to unconstitutionally favor one party over another. The fuel oil industry, which involves intense competition among dealers in the same area, is quite unlike the monopoly situation enjoyed by Central Hudson.[12] Fuel oil dealers, unlike utilities, are not required to advertise conservation measures. They are not in the position of promoting conservation at the same time they are urging use of their product.[13]

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[12] Central Hudson's monopoly is the reason why its business must be extensively regulated in the public interest by the Commission in accordance with the state interests discussed in Point II, *supra*.

[13] Even though the Commission has restricted utilities from promotional advertising, it has not prohibited advertising by others, including appliance dealers and manufacturers of electric space heating equipment. Advertisement of electric space heat *per se* has therefore not been precluded by the State since entities other than utilities remain free to promote it.

Police Department of Chicago v. Mosley, 408 U.S. 92 (1972), cited by Central Hudson (Jurisdictional Statement, p. 23) does not address a situation similar to the case at hand. There Chicago had placed in a favored status one form of picketing (labor), while banning all other kinds. Here, the Commission's ban on promotion of electricity, while encompassing electric space heat, has no bearing on what proponents of oil heat may or may not do, or for that matter, what electric contractors or appliance dealers may do.

Conclusion

For the above reasons, this appeal should be dismissed or the decision of the New York Court of Appeals summarily affirmed.

Respectfully submitted,

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